83-286

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

GWEN L. KILLOUGH,
Petitioner,

Vs.

STATE OF ALABAMA
Repondent,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

FRANK L. THIEMONGE, III
Attorney for Petitioner
414 Grove Street
Montgomery, AL 36101

QUESTIONS PRESENTED

1. May a trial court condition probation upon a payment of a specified sum of money when the sum has not been acknowledged, conclusively established in a criminal proceeding, or finally determined in civil litigation?

2. May a state court grant restitution in excess of the amount charged in the indictment when the defendant denies owing more than the amount alleged in the indictment and without a hearing to determine the defendant's ability to pay?

INDEX

CITATIONS

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Alabama, Which is not yet reported, appears in the appendix to this petition as well as the order of the Supreme Court of Alabama issuing a writ of certiorari to the Alabama Court of Criminal Appeals.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on June 10, 1983. The jurisdiction of this court is involved under 28 U. S. C. 1557(2).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

GWEN L. KILLOUGH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF ALABAMA

Petitioner, Gwen L. Killough prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama entered in this cause on June 10, 1983. References to lower Court Opinion at page 1.

STATEMENT OF THE CASE

Appellant, Gwen L. Killough, was indicted by a Montgomery County Grand Jury on January 12, 1981, for violation of Code of Alabama 1975, § 13A-8-3, theft of property, first degree.

On July 17, 1981, a restitution and sentencing hearing was held and continued on July 17, 1981, at the conclusion of which the Appellant was sentenced to serve five years in the penitentiary. Defendant denied taking more than the $1,361.94 for which she was indicted. Appellant was given a suspended sentence and placed on probation conditioned upon her serving twelve months in the county jail, paying fifty-eight thousand, seven hundred and fifty-five dollars ($58,755) restitution and fourteen thousand, nine hundred and thirty-six dollars ($14,936) court costs and expenses.

On August 27, 1981, Appellant filed a motion to withdraw her guilty plea and entered a plea of not guilty. (A 1-6). The motion was granted on September 4, 1981. (A 7,8). On October 15, 1981, the Alabama Court of Criminal Appeals granted the State's petition for writ of mandamus and directed the trial court to vacate and hold for naught its order of September 4, 1981. (A 9).

On March 25, 1983, the Supreme Court of Alabama granted a writ of certiorari to the Court of Criminal Appeals on the issue of whether a trial court may order restitution for an amount in excess of that charged in the indictment and in excess of the amount admitted by the Defendant. (A-11,12). This same court in an opinion affirming that of the Court of Criminal Appeals failed to address this issue and merely held that a defendant's probation may be conditioned on the defendant paying restitution in ex-

cess of the amount that the indictment alleges.

ARGUMENT:

This is in conflict with U. S. v. Touchet, 658 Fed Rep 2d 1074, which plainly held that a trial court may not condition probation upon payment of a specified sum of taxes when the sum has not been acknowledged, conclusively established in a criminal proceedings, or finally determined in a civil litigation.

In Atwater v. Roudebush, D.C.III, 1976, 452 F. Supp. 622, essential components of procedural due process are right to notice and opportunity to be heard, which must be granted at meaningful time and in meaningful manner. The only formal and proper notice that the defendant ever had was an indictment of $1,361.94, yet she was ordered by the appellate court to

make restitution of $58,755.00 as a condition of her probation. The State does not claim that any hearing was held to determine the defendant's ability to pay such a large sum. She was merely ordered to pay it or go to jail for five years without probation. This is in violation of Bearden v. Georgia, 51 L. W. 4616.

In Phillips v. United States, 679F 2d 192 (9th Cir. 1982) and United States v. McLaughlin 512F Supp. 907 (D Md 1981) cited by the Alabama Supreme Court are not identical to the instant case. In both Phillips and McLaughlin the defendants were indicted for the amounts for which restitution was granted, thus giving adequate notice in writing of the amounts to be claimed.

In McLaughlin the plea bargain terms are set forth in the record at rearraignment; the defendant as a matter of record agreed

personally to the terms; she was indicted for the amount ordered in the restitution; and she agreed to that amount of restitution ordered while pleading guilty to only one count.

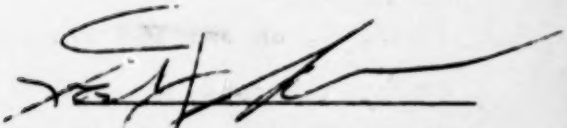
None of these facts exist in petitioner's case. The petitioner was indicted only in only in one court and only for $1,361.94. She pleaded guilty to this amount only. The State does not claim that she ever admitted taking more than the amount in the indictment, nor do they claim that the details of any agreement and an explanation of such agreement to the petitioner exists in the trial court record. In spite of this and without adequate notice at any time before any hearing the petitioner was at the termination of said hearing ordered by this trial court to pay not the $1,361.94 but to pay $73,691.00, or to serve a five year term in the State Prison without probation.

Petitioner urges that this violates whatever agreement that she had with the trial court and that it denies her right to due process of law guaranteed by the 14th amendment.

CONCLUSION

For the reasons alleged in the foregoing, the petitioner humbly prays that this petition for writ of certiorari be granted and the trial court be reversed.

Respectfully submitted,



Frank L. Thiemonge, III
Attorney for Petitioner
414 Grove Street
Montgomery, Alabama 36104
P. O. Box 3
Montgomery, Alabama 36101
Phone (205) 263-1037

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition upon Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administration Building, Montgomery, Alabama 36104, by mailing a [redacted] copy of the same to him, postage prepaid, this 19 day of August, 1983.

Frank L. Thiemonge, III
Attorney for Petitioner

APPENDIX

IN THE CIRCUIT COURT OF

MONTGOMERY COUNTY, ALABAMA

Criminal Case No. 81-651-TH

STATE OF ALABAMA, Plaintiff, -vs- GWEN L. KILLOUGH, Defendant.	CRIMINAL NO. 81-651-TH

MOTION TO WITHDRAW GUILTY PLEA AND ENTER NOT GUILTY PLEA AND MOTION FOR A NEW TRIAL

The Defendant through her counsel moves this Honorable Court to withdraw Defendant's guilty plea: and to enter a plea of not guilty and also to order a new trial and said Defendant assigns grounds as follows;

1. A failure by the State to make full disclosure of it's evidence to Defendant or Defendant's counsel violated Defendant's

agreement with the Court.

2. Defendant is being denied due process as guaranteed by both the Constitution of the United States of America and of that of the State of Alabama.

3. Defendant is in danger of being deprived of property and liberty without due process of law.

4. This Honorable Court was without jurisdiction to award restitution of a sum of money in excess of that alleged in the indictment.

5. The Court's rulings on the admissibility of evidence at the restitution hearing and it's judgment and sentence at the termination of said hearing is an unconstitutional application of the statutes under which the Defendant was indicted and tried.

6. This Court broke it's agreement with the Defendant and Defendant's counsel, by allowing at the close of the restitution hearing a showing by the State of thousands

of dollars in expenses, not one item of which was ever disclosed to the Defendant or her counsel. This violated the agreement Defendant had with the Court that the State would make full disclosure of all it's evidence to the Defendant and to her counsel.

7. The State repeatedly and deliberately failed to make full disclosure of it's evidence to Defendant and her counsel and this was in breach of Defendant's agreement with the Court as well as a breach of this Court's unenforced order to the State to make full disclosure to Defendant's counsel of it's case against Defendant.

8. The judgment and sentence of restitution by the Court is based on hearsay, conjecture and suspicion as well as the unsupported and unsworn statement of the District Attorney's office.

9. The State's Witnesses testified that in a period covering about five years that only four days had been audited, and

any money judgment by this Court in any other period than the four days audited is one based on hearsay, suspicion and conjecture--a hearsay recap of the proscuting witness's records and books.

10. Defendant was denied due process as guaranteed by the 14th amendment of the Constitution of the United States of America.

11. Defendant was denied her right to counsel as she was not allowed to present her case in an orderly fashion.

12. Defendant was denied her right to counsel as guaranteed by the United States Constitution as she was not allowed to present her defense in an orderly fashion but was constantly interrupted by the Court and District Attorney with questions and then engaged by the Court and District Attorney in argument as to her answers in a manner that confused, intimidated, and disorganized Defendant's effort to present an orderly defense.

13. Defendant has not been guilty of anything but pleaded guilty to the indictment only while under emotional duress from threats by the District Attorney's office and with confidence a fair hearing would exhonorate her from the untrue charges of having stolen thousands when in fact Defendant has stolen not one dollar.

14. Courts failure to allow defense to question closely the financial background of the main prosecuting witness, Smith, was a denial by this Court of the Defendant's right to counsel as guaranteed by the Constitution of the State of Alabama and the United States of America.

15. The Court erred in allowing an offer of proof by the State of the expenses involved in the prosecution of a sum of money based on documents never offered or shown to Defendant or her counsel and said documents and amounts were only described by the unsworn word of the Assistant District Attorney.

JOHN NILE McGEE, JR.
Attorney for Defendant
P. O. Box 3
Montgomery, Alabama 36101
Phone 263-3707

Certificate of Service

I hereby certify that I have served a copy of the above upon the Montgomery County District Attorney's Office, by hand delivering same, this 27th day of August, 1981.

John Nile McGee, Jr.

WITHDRAWL OF GUILTY PLEA

FRIDAY, SEPTEMBER 4, 1981

COURT MET PURSUANT TO ADJOURNMENT

PRESENT THE HONORABLE H. RANDALL THOMAS, JUDGE PRESIDING

STATE OF ALABAMA

VS. NO. CC-81-651-TH OFFENSE -

GWEN L. KILLOUGH THEFT I

This day came the State by its District Attorney and came also the defendant in her own proper person and by her attorney, Honorable John N. McGee, Jr., and it appearing to the court that the defendant heretofore filed a Motion to Withdraw Guilty Plea, and the court having heard argument from the District Attorney and the defendant's attorney is of the opinion that the defendant should be allowed to withdraw her guilty plea. It is therefore considered and ordered by the court that the defendant be allowed to

withdraw her guilty plea. It is further ordered by the court that this cause should be restored to the active trial docket and a trial date set. Defendant's bond is increased to $10,000.oo by the court.

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

3 Div. 470

EX PARTE STATE OF ALABAMA, EX REL JAMES H. EVANS, AS DISTRICT ATTORNEY FOR THE FIFTEENTH JUDICIAL CIRCUIT, AND CHARLES A. GRADDICK, ATTORNEY GENERAL OF ALABAMA

In Re: State of Alabama v. Gwen Killough

PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, FOR A WRIT OF PROBATION

Montgomery Circuit Court

IT IS ORDERED THAT the petition for writ of mandamus be and the same is hereby granted. The trial court is directed to vacate and hold for naught his order of September 4, 1981, purporting to set aside plea of guilty. Per Curiam. Tyson, DeCarlo, Bookout, and Bowen, JJ, concur.

WITNESS, Mollie Jordan,

Clerk of the Court of Criminal Appeals, this 15th day of October, 1981.

Mollie Jordan
CLERK, COURT OF CRIMINAL APPEALS OF ALABAMA

MARCH 25, 1983

THE STATE OF ALABAMA--------JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

OCTOBER TERM 1982-83

82-437

Ex Parte: Gwen L. Killough

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

Re: Gwen L. Killough vs. State of Alabama

Upon a preliminary examination of the petition in the above cause, the Court concludes that there is a probability of merit in the petition and has today granted the writ on the following issue:

> "The issue is whether the appellate court erred in in whole that the trial court may order restitution for an amount in excess of that charged in the indictment and in excess of the amount admitted by the Defendant."

IT IS THEREFORE ORDERED that the writ issue to the Court of Criminal Appeals and that this cause be set for oral argument in

accordance with Rule 39, Alabama Rules of Appellate Procedure.

PER CURIAM.

TORBERT, C.J., MADDOX, JONES, SHORES, AND BEATTY, JJ., CONCUR.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 28th day of March 1983.

DOROTHY F. NORWOOD

Acting Clerk, Supreme Court of Alabama

JUN 10 1983

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1982-83

Ex parte: Gwen L. Killough

Petition for Writ of Certiorari to the

Court of Crimimal Appeals

(Re: Gwen L. Killough

82-437 vs.

State of Alabama)

MADDOX, JUSTICE.

The sole issue presented in this case is whether a Defendant who pleads guilty to an indictment can be required, as a condition of probation, to make restitution in an amount greater than that alleged in the incitment.

As the Court of Criminal Appeals correctly states in its opinion, the trial judge had authority to require Killough to make restitution as a condition of her probation. Code 1975, § 15-22-52(8). The Court of Criminal Appeals determined that other state courts, construing statutes similar to

§ 15-22-52(8), had limited the amount specified in the indictment to which the Defendant pleaded guilty, but concluded that"a defendant can agree to pay a larger amount in restitution as part of a plea bargain agreement." Phillips v. United States, 679 F. 2d (9th Cir. 1982); United States v. McLaughlin, 512 F. Supp. 907 (D Md. 1981). We agree with the Court of Criminal Appeals and specifically hold that a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant made an agreement as part of a plea bargain.

The Court of Criminal Appeals, after reviewing the testimony taken at the sentencing hearing, was led to conclude that " a plea bargain existed in which appellant agreed to make full restitution." That court attached Appendix A to its opinion to support its conclusion.

After reviewing the opinion of the Court

of Criminal Appeals, the briefs of the parties, the argument made before this Court by counsel for the defendant and the state, we can conclude that Killough did agree to make restitution in an amount in excess of that charged in the indictment, and that the Court of Criminal Appeals was justified in holding that Killough agreed to make "full restitution," which that court determined was the sum of $58,755.00 in this case. We hold, as did the Court of Criminal Appeals, that " if appellant wishes t' avoid payment of full restitution, her alternative is to serve the five-year prision sentence."

The Court of Criminal Appeals found:

> "Although we affirm appellant's conviction and find that the trial court committed no error in ordering restitution in an amount exceeding that specified in the indictment, we must remand this cause for a determination of whether the $14,936.00 claimed as expenses was properly included as restitution. There is no clear indication in the record as to who incurred these expenses. If these expenses were incurred by the State and amounted to investigation

expenses they could not properly be included as restitution. United States v. Vaughn, 636 F. 2d 921 (4th Cir. 1980)."

We agree with that court's determination that a court cannot order restitution of expenses incurred by the state.

Based on the foregoing, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

Torbert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

I, Dorothy F. Norwood, as Acting Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this the 10 day of June 1983

Dorothy F. Norwood
Acting Clerk, Supreme Court of
Alabama

NO. 83-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

GWEN L. KILLOUGH,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

QUESTION PRESENTED

Has any constitutional right of a defendant been violated when a state court, as a condition of probation, orders a defendant to make restitution in an amount in excess of the amount alleged in a theft indictment, where the defendant, as part of a plea bargain process agrees, in exchange for a recommendation of probation, to make restitution in whatever amount the State can prove was stolen and the amount of restitution ordered is established by sworn testimony of an accountant based on an audit and by sworn testimony as to the defendant's contemporaneous bank deposits.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CON'T.

CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

NO. 83-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

GWEN L. KILLOUGH,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

1. The Opinion of the Court of Criminal Appeals, reported as Killough v. State, 434 So. 2d 849 (Ala. Cr. App. 1982), appears in the appendix to this brief.

2. The Opinion of the Supreme Court of Alabama, reported as Ex parte: Gwen L. Killough, 434 So. 2d 852 (Ala. 1983), was submitted by Petitioner in the appendix attached to her petition for a writ of certiorari.

JURISDICTION

The jurisdiction of this Court has not been invoked under the statute cited by Petitioner, 28 U.S.C. § 1557(2).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Respondent adopts the Statement of the Case as set forth in the opinion of the Alabama Court of Appeals in Killough v. State, 3 Div. No. 982 (Ala. Cr. App. Dec. 28, 1982). That part of the opinion, found on pages 1-3, is quoted:

> The indictment in this case charged that Appellant "did knowingly obtain or exert unauthorized control over $1361.94...the property of Capitol City Laundry, with the intent to deprive the said owner of the said property in violation of § 13A-8-3 of the Code of Alabama." Appellant pleaded guilty to this charge on June 5, 1981. After properly determining that the guilty plea was intelligently and voluntarily entered, the trial court adjudged Appellant to be guilty and continued the case for "sentencing and probation determination."
>
> The sentencing and probation hearing began on July 17, 1981, but was continued until July 31, 1981, when the trial judge realized the complexities involved in determining for

restitution purposes the actual amount embezzled by Appellant. At the hearings, the State presented evidence that the Appellant, acting in her capacity as bookkeeper for Capitol City Laundry, had illegally taken money paid by customers on accounts due and deposited that money in her personal bank accounts. In addition to the $1,361.94 averred in the indictment and apparently taken during 1980, the State presented evidence that Appellant similarly embezzled approximately $90,000 in years prior to 1980.

At the conclusion of the second hearing, the trial judge sentenced Appellant to five years imprisonment. He then suspended the sentence and placed appellant on probation for five years "conditioned upon [appellant's] spending twelve months in the county jail, paying court costs, paying restitution in the amount of $73,691, and any and all conditions as may be imposed by the court at a later date." Included in the total amount of restitution was $14,936 claimed as "litigation expenses."

Appellant subsequently filed a "Motion to Withdraw Guilty Plea and Enter Not Guilty Plea and Motion for a New Trial" which was granted by the trial

> judge. The State sought and was granted by this court a writ of mandamus directing the trial court to vacate its order purporting to set aside the plea of guilty because Appellant's motion was not timely filed. The Appellant now prosecutes this appeal requesting that this court "declare the judgment and sentence of the lower court to be null and void as to the amount of restitution ordered in excess of the amount alleged in the indictment which is $1,361.94" or "reverse the sentence and order a new trial."

The Alabama Court of Criminal Appeals affirmed the conviction on December 28, 1982, holding that restitution in excess of indictment amount could be imposed as a condition of probation since the Petitioner had agreed to make full restitution as part of a plea bargain agreement. An application for rehearing was filed by Petitioner and overruled on February 1, 1983.

A petition for a writ of certiorari was in the Supreme Court of Alabama which

was granted on March 25, 1983. The case was orally argued before the Alabama Supreme Court on May 9, 1983. The Alabama Supreme Court unanimously affirmed the holding of the Alabama Court of Criminal Appeals on June 10, 1983, and specifically held that "a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant made an agreement as part of a plea bargain." The Alabama Supreme Court further concluded that Petitioner "did agree to make restitution in an amount in excess of that charged in the indictment, and that the Court of Criminal Appeals was justified in holding that Killough agreed to make full restitution."

Petitioner then filed a petition for certiorari in this Honorable Court on August 8, 1983. The Respondent waived its right to file a brief in opposition

to certiorari in its letter to this Court on September 6, 1983. On October 13, 1983, Respondent was directed to file a further response.

REASONS FOR DENIAL OF THE WRIT

PURSUANT TO A PLEA BARGAIN AGREEMENT, PETITIONER AGREED TO MAKE FULL RESTITUTION IN WHATEVER AMOUNT THE STATE COULD PROVE PETITIONER STOLE, EVEN IF THE AMOUNT WAS GREATER THAN THE INDICTMENT AMOUNT, IN RETURN FOR THE STATE'S RECOMMENDATION OF PROBATION.

Petitioner raises three points in her argument to this Court: (1) that the sum which has been ordered to be paid as a condition of probation was not "acknowledged, conclusively established in a criminal proceedings (sic), or finally determined in a civil litigation"; (2) that Petitioner had no notice of the amount she was ordered to

pay; and (3) that no hearing was held to determine Petitioner's "ability to pay such a large sum." The writ of certiorari should not be granted because there is no merit to any of these three points.

First, a restitution hearing was held at which sworn testimony was presented to determine the exact amount that Petitioner embezzeled from her place of employment. Petitioner's attorney was present and was allowed to cross-examine the witnesses. The Petitioner also testified and explained to the court exactly how she stole the money in question. The court then ordered Petitioner to pay the amount which had been established that she stole. The trial court also stated that he would review the case prior to her release and determine the nature in which the amount would be paid back.

There is no truth in Petitioner's claim of inadequate notice as to the amount she could be required to pay in restitution. As is clearly shown by Appendix A of the Court of Criminal Appeals Opinion, the Petitioner agreed to pay whatever sum the State could prove that she stole in return for probation and she was on notice that the State was going to prove over the indictment amount. (See Appendix A) In fact, the State had informed Petitioner that they were alleging "some ninety thousand dollars worth of restitution in this case" prior to the taking of the plea. The amount ordered in restitution was then established by competent evidence at an evidentiary hearing.

Throughout these proceedings, Petitioner's attorney has admitted numerous times that the plea bargain agreement was that his client would make "full restitution over and above what was in the

indictment." Said attorney was asked point blank by the Alabama Supreme Court whether Petitioner had agreed to pay over the indictment amount, and he admitted that was the agreement but he just felt the final amount determined was too high. However, Petitioner's main contention was that the State had failed to give adequate disclosure of documentary evidence -not that they had violated the plea bargain agreement by proving more than the indictment amount.

Further, proof that there was proper notice is the fact that Petitioner herself knew the amount which could be proved as she was the one who took the money and deposited it into her personal bank account. Thus, Petitioner entered the plea with notice that she could be ordered to pay ninety thousand dollars in restitution when, in fact, she was only ordered to pay fifty-eight thousand. Therefore, Petitioner's claim of improper

notice must also fall.

Petitioner's final point is that there was no hearing held to determine her ability to pay the amount of restitution ordered. However, such a hearing is not required as here, Petitioner agreed to make restitution in whatever amount the State could prove. Thus, her ability to pay does not come into play, as at no point did she ever assert that she would be unable to pay the sum. As stated earlier, Petitioner took the money and thus knew the sum which she could be ordered to pay. Thus, she should have asserted her inability to pay at that point instead of agreeing to pay restitution in any amount.

Petitioner relies upon the case of Bearden v. Georgia, No. 81-6633, 51 U.S.L.W. 4616 (May 24, 1983), in this argument. However, that case has no

application to the case at hand. In Bearden, this Honorable Court held that it was error for the defendant's probation to be automatically revoked because of his failure to pay his fine without first determining whether defendant had made bona fide efforts to pay or that adequate alternative forms of punishment did not exist.

Here, such an argument is premature as there has been no revocation of her probation. Moreover, the trial court's order stated that at a later date he would determine the manner in which the money would be paid back. Thus, it may not be assumed that the trial court will automatically revoke Appellant's probation without holding a hearing to determine how it is to be made. In all probability it will be determined how much she can afford to pay each month and that amount ordered. If, however, such a

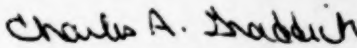
determination is not made, it is at that point that Petitioner should make this argument, not now. Thus, Petitioner's argument cannot prevail especially since Petitioner is still free on probation.

Under the federal cases relied on by the Alabama courts, Phillips v. United States, 679 F.2d (9th Cir. 1982) and United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981), it is clear that a defendant can be ordered to pay restitution in an amount in excess of the amount stated in the indictment, if the defendant has agreed to do so as part of a plea bargain arrangment. Here, the Alabama Court of Criminal Appeals and the Alabama Supreme Court both correctly held that based upon the record and Petitioner's statements during oral argument, that such a plea bargain in fact existed. The writ of certiorari should not issue because these rulings are correct.

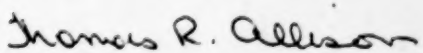
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA



/s/ Thomas R. Allison
THOMAS R. ALLISON
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

APPENDIX

December 28, 1982

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

3 Div. 482

Gwen L. Killough

v.

State

Appeal from Montgomery Circuit Court

DeCARLO, JUDGE

First degree theft; five years imprisonment.

The indictment in this case charged that Appellant "did knowingly obtain or exert unauthorized control over $1361.94 . . . the property of Capitol City Laundry, with the intent to deprive the

said owner of the said property in violation of § 13A-8-3 of the Code of Alabama." Appellant pleaded guilty to this charge on June 5, 1981. After properly determining that the guilty plea was intelligently and voluntarily entered, the trial court adjudged Appellant to be guilty and continued the case for "sentencing and probation determination."

The sentencing and probation hearing began on July 17, 1981, but was continued until July 31, 1981, when the trial judge realized the complexities involved in determining for restitution purposes the actual amount embellled by Appellant. At the hearings, the State presented evidence that the Appellant, acting in her capacity as bookkeeper for Capitol City Laundry, had illegally taken money paid by customers on accounts due and deposited that money in her personal bank

accounts. In addition to the $1,361.94 averred in the indictment and apparently taken during 1980, the State presented evidence that appellant similarly embezzled approximately $90,000 in years prior to 1980.

At the conclusion of the second hearing, the trial judge sentenced Appellant to five years imprisonment. He then suspended the sentence and placed Appellant on probation for five years "conditioned upon [appellant's] spending twelve months in the county jail, paying court costs, paying restitution in the amount of $73,691, and any and all conditions as may be imposed by the court at a later date." Included in the total amount of restitution was $14,936 claimed as "litigation expenses."

Appellant subsequently filed a "Motion to Withdraw Guilty Plea and Enter Not Guilty Plea and Motion For a New

trial" which was granted by the trial judge. The State sought and was granted by this court a writ of mandamus directing the trial court to vacate its order purporting to set aside the plea of guilty because Appellant's motion was not timely filed. The Appellant now prosecutes this appeal requesting that this court "declare the judgment and sentence of the lower court to be null and void as to the amount of restitution ordered in excess of the amount alleged in the indictment which is $1,361.94" or "reverse the sentence and order a new trial."

Our legislature has passed an act which states that its purpose is to require "all perpetrators of criminal activity or conduct. . . to fully compensate all victims of such conduct or activity for any pecuniary loss, damage or injury as a direct or indirect result

thereof." 1980 Ala. Acts 80-588 (codified at Ala. Code : 15-18-65 through 77 (Supp. 1982). This act did not become effective until May 28, 1980, however, and this court has held that it is not to be given retroactive application. Cox v. State, 394 So. 2d 103 (Ala. Crim. App. 1981). This statute would therefore authorize restitution only for the period between May 28, 1980, and August, 1980, when Appellant left the employ of Capitol City Laundry.

Before the passage of the 1980 act, however, the trial judge could, as a condition of probation, require an offender to "make reparation or restitution to the aggrieved party for the damage or loss caused by his offense." Ala. Code § 15-22-52(8) (1975). See also Ala. Code § 15-18-8(d)(2) (1975). Quite clearly, then, the trial judge had the authority to require Appellant to

make restitution as a condition of her probation. What we must now determine is the amount of restitution which can properly be imposed upon Appellant.

In interpreting a probation statute very similar to § 15-22-52(8), a New York court held that the words "his offense" meant "only the offense for which the defendant is on trial before the court, and cannot be stretched to cover similar offenses committed by the defendant against the same party or various parties." People v. Funk, 117 Misc. 778, 193 N.Y.S. 302 (1921). The court then limited the restitution amount to the amount specified in the indictment to which the defendant pleaded guilty. Other state courts, construing similar statutes, have reached the same conclusion. E.g. People v. Mahle, 57 Ill. 2d 279, 312 N.E. 2d 267 (1974);

State v. Eilts, 23 Wash. App. 39, 596 P. 2d 1050 (1979).

The Federal Probation Act provides that, as a condition of probation, a defendant "may be required to make restitution or reparation to aggrieved parties for actual damages on loss caused by the offense for which conviction was had." 18 U.S.C. § 3651 (1976). In construing this provision the federal courts have generally held, like the state courts above, that the restitution amount is to be limited to the amount charged in the indictment or the count of the indictment to which the defendant pleaded guilty or was convicted. Karrell v. United States, 181 F. 2d 981 (9th Cir. 1982), cert. denied, 340 U.S. 891 (1950); United States v. Follette, 32 F. Supp. 953 (E.D. Pa. 1940). Two federal courts have recently held, however, that a defendant can agree to pay a larger

amount in restitution as part of a plea bargain agreement. Phillips v. United States, 679 F.2d 192 (9th Cir. 1982); United States v. McLaughlin, 512 F. Supp. 907 (D. Md. 1981).

A review of the record in the instant case[1] leads us to conclude that a plea bargain existed in which Appellant agreed to make full restitution. It is clear that the trial judge was aware of this agreement and, in fact, had an agreement of his own with Appellant to the same effect. Because Appellant agreed to make full restitution, the trial judge could impose that as a condition of probation.[2] See Phillips v.

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[1]Portions of the record are attached to this opinion as Appendix A.

[2]We note that the full amount alleged by the State to have been embezzled by Appellant was not imposed as restitution by the trial judge.

United States, supra; United States v. McLaughlin, supra. If Appellant wishes to avoid payment of full restitution, her alternative is to serve the five-year prison sentence.

We note that the plea bargain agreement in McLaughlin, supra, was fully entered on the record along with a finding that the defendant voluntarily entered the agreement. In Phillips, supra, the plea bargain was "fully explored in open court."

Although we affirm Appellant's conviction and find that the trial court committed no error in ordering restitution in an amount exceeding that specified in the indictment, we must remand this cause for a determination of whether the $14,936 claimed as expenses was properly included as restitution. There is no clear indication in the record as to who incurred these expenses.

If these expenses were incurred by the State and amounted to investigation expenses they could not properly be included as restitution. United States v. Vaughn, 636 F. 2d 921 (4th Cir. 1980).

For the reasons stated above, the judgment of conviction by the Montgomery Circuit Court is affirmed and the cause is remanded in part for determination in accordance with this opinion.

AFFIRMED; REMANDED IN PART.

All the Judges concur

APPENDIX A.

"THE COURT: At the first hearing, not only at the first hearing but even prior to the plea, wasn't it brought to your attention that they were alleging some ninety thousand dollars worth of restitution in this case?

"MR. MCGEE: They were alleging an awful large amount of restitution, but as far as giving me disclosure of documentary evidence, the expenses, to this day, I have never received any nor has the defendant.

"THE COURT: At the conclusion of the first hearing, didn't I put the case off for two weeks. . .

"MR. MCGEE: Yes, sir, for some time --

"THE COURT: . . . And I asked you to get all of your facts together and find out what the case is all about. That they were alleging some ninety thousand dollars worth of restitution?

"MR. MCGEE: It was the thirteen hundred dollars, only, which is all we ever admitted to.

"MR. HAWTHORNE: You're talking about before the plea.

"THE COURT: No, after the plea and you said something about ninety thousand dollars worth of restitution.

"MR. HAWTHORNE: At the plea, before she took the plea, we said we are talking about ninety thousand dollars. All you have to do is look back on the record.

"THE COURT: In your fourth count you said the Court was without jurisdiction to award restitution of the sum of money in excess of that alleged in the indictment. What was your agreement with the Court?

"MR. MCGEE: That I would enter a plea of guilty, and we would have a restitution hearing.

"THE COURT: And that full restitution be made over and above what was in the indictment; is that right?

"MR. MCGEE: And full disclosure ordered.

"THE COURT: Then why wouldn't I have jurisdiction? You made that agreement, didn't you?

"MR. MCGEE: But, we didn't have full disclosure. I don't think that we had a fair hearing. I think the defense was denied their right to put on --

"THE COURT: But, based on your agreement on the plea of guilty --

"MR. MCGEE: I don't think that I can confer jurisdiction with any kind of agreement with this Court. I think only statutory law can do that.

"MR. HAWTHORNE: Why did you make the agreement?

"MR. MCGEE: It takes two.

. . .

"THE COURT: Did you ever disclose [to] them prior to the hearing, the amount of money you claimed in resitution?

"MR. HAWTHORNE: Yes, sir. we disclosed that prior to the guilty plea.

. . .

"MR. HAWTHORNE: . . . We disclosed eighty-nine to ninety thousand dollars prior to the defendant's pleading guilty, and at that time the Court said whatever the State can show and prove, then I am going to grant as far as restitution. Mr. McGee said that that was fine.

"MR. MCGEE: With the understanding I was to receive copies of the documents that you were going to use, which I have not to this day, nor has the defendant, received documents on expenses.

. . .

"THE COURT: And I recall at the beginning of the second restitution hearing you filed a motion to limit the restitution to thirteen hundred dollars, and at that time the Court gave you the alternative to back out [of] your plea, go to trial . . .

"MR. MCGEE: True.

"THE COURT: . . . or stick to the original agreement, which was to pay whatever restitution was.

"MR. MCGEE: I filed a motion because I didn't think we were sticking to the agreement because of the failure of the District Attorney's Office to disclose --

"THE COURT: But then you must have decided you were going to.

"MR. MCGEE: My client decided that, Your Honor; not about the agreement, but she didn't want to go to trial." [Emphasis added]

CERTIFICATE OF SERVICE

I, Thomas R. Allison, an Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the 9th day of November, 1983, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows: